IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.7103 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

==========

AHMEDABAD PEOPLE'S COOPERATIVE BANK LTD - Petitioner
Versus
DG PANSARI, ITO, Ward 2(7), Ahmedabad - Respondent

==========

Appearance :
MR SN DIVATIA for Petitioner.
MR MANISH R BHATT for Respondent.

==========

CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 10/07/2006

ORAL JUDGMENT

(Per : THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI)

1. The instant petition under Article 226 of the Constitution has been filed by Ahmedabad People's

Cooperative Bank Limited with a prayer to issue a writ of certiorari to set aside the impugned notice dated 8th March 1999 issued by the respondent whereby it is proposed to reopen the completed assessment of the petitioner for assessment year 1989-90.

2. Briefly stated, facts of the case are that the petitioner is a registered cooperative society. The petitioner is engaged in the business of banking and also provides credit facilities. The activities of the petitioner are governed by the provisions of the Gujarat Cooperative Societies Act, 1961 and the Rules framed thereunder as well as the Banking Regulation Act, 1949. For the assessment year 1989-90, the petitioner submitted a return on 21st October 1989 declaring Rs.28,598/- as total income. In the return of income so filed, the petitioner had shown gross total income of Rs.34,03,003/-. Out of this amount, a deduction under Section 80P of the Income Tax Act, 1961 (“the Act” for short) was claimed for Rs.33,54,405/-.

3. It is averred by the petitioner that it had claimed

the deduction under Section 80P in respect of its income from banking business computed at Rs.33,54,405/- in the manner in which it had been claiming the same in the past. The assessment of the petitioner was completed by the then Assessing Officer under Section 143(1)(a) of the Act on 8th February 1990 on the income of Rs.28,600/-. The Assessing Officer thereafter reopened the assessment in order to bring to tax locker rent and miscellaneous income from the business since, according to the Assessing Officer, the same were not exempt under Section 80P(2)(a)(i) of the Act being not the income from business. The Assessing Officer completed the re-assessment on 29th March 1995 and assessed the total income at Rs.85,910/-.

4. Thereafter, the respondent issued notice dated 8th March 1999 under Section 148 of the Act to the petitioner stating, *inter alia,* that income had escaped the assessment and it was proposed to re-assess the income chargeable to tax for the assessment year 1989-90. It is the case of the petitioner that notice under Section 148 of the Act has been issued beyond the period of four years in respect of the assessment under Section 143(3) of

the Act and the reasons recorded do not indicate that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. It is stated by the petitioner that since the basic requirements of the provisions of Section 143(3) of the Act have been completed, the Assessing Officer has no jurisdiction to reopen the assessment in view of proviso to Section 147 of the Act. Under the circumstances, the petitioner has filed the instant petition and claimed the relief, which is referred to earlier.

5. On service of notice of Rule, Mr.D.G.Pansari, Income Tax Officer, Ward 2(7), Ahmedabad, has filed an affidavit-in-reply controverting the averments made in the petition. It has been stated in the reply that the petition, which is premature, should not be entertained since only notice under Section 148 of the Act has been issued and if the petitioner is aggrieved by the reassessment so made, an alternative remedy by way of challenging the same before the Appellate Authority under the Act is open to the petitioner. It has further been stated that before issuance of notice under Section 148 of the Act, the reasons have been recorded as

well as prior approval/sanction has been obtained as required by the Act and, therefore, the challenge to the notice issued under Section 148 of the Act is misconceived. The reasons, which have been recorded, have been produced by Mr.Pansari as Annexure-1 to the reply affidavit, perusal of which makes it very clear that the case is re-opened on the basis of the decision on the Supreme Court in the case of **M.P.Cooperative Bank Limited vs. Additional C.I.T., 218 ITR 438 (SC)** wherein a view was taken that the income derived from the investment in government security placed with the State Bank of India or the Reserve Bank of India could not be regarded as an essential part of the assessee's banking activities as a result of which, the interest on Government securities placed with the State Bank of India or the Reserve Bank of India, would not qualify for exemption under Section 81 (now Section 80P) of the Act.

6. This Court has heard Mr.S.N.Divatia, learned counsel for the petitioner, and Ms.Mona M. Bhatt, learned counsel for the respondent, at length, and has also perused the averments made in the petition as well as material annexed thereto.

7. From reading of the Annexure-1 appended to the affidavit-in-reply of the respondent, which contains the reasons for re-opening the assessment under Section 148 of the Act, it is evident that reliance has been placed on the decision of the Supreme Court in the case of **M.P.Cooperative Bank Limited (Supra)**. It is relevant to note that neither in the notice dated 8th March 1999 issued under Section 148 of the Act nor in the reasons, which have been recorded for issuing notice under Section 148 of the Act, it is alleged that the petitioner had failed to disclose fully and truly all the material facts necessary for its assessment for the assessment year concerned. Since it was issued beyond a period of four years, it was incumbent upon the respondent to state so in the notice issued under Section 148 of the Act in view of the proviso to Section 147 of the Act more particularly when the assessment was completed under Section 143(3) of the Act. Further, the decision rendered in **M.P.Cooperative Bank Limited (supra)**, has now been overruled by the Supreme Court in **Commissioner of Income-Tax vs. Karnataka State Cooperative Apex Bank, (2001) 251 ITR 194**

holding that interest arising from investment made in compliance with statutory provisions to enable it to carry on banking business, out of reserve fund by a cooperative society engaged in banking business, is exempt under Section 80P(2)(a)(i) of the Act. Moreover, in **Commissioner of Income Tax vs. Baroda Peoples Cooperative Bank Limited, (2006) 280 ITR 282,** the assessee which was a cooperative bank, had earned interest from investments in (i) IDBI Bonds, (ii) SBI Bonds, (iii) Sardar Sarovar Narmada Bonds, and (iv) Kisan Vikas Patra. The Assessing Officer had treated all the aforesaid investments as 'fixed capital' and held that the investments were not available for normal banking business and, therefore, the entire income was taxable. The Special Bench of Tribunal held that income was entitled to special deduction under Section 80P of the Act. In appeal, the Division Bench of this Court held as under:

> *“Section 80P(2)(a)(i) permits a co-operative society engaged in carrying on the business of banking or providing credit facilities to its members to claim deduction of the whole of the amount of profits and gains of business attributable to such activity, viz., business of banking or providing*

credit facilities to its members. On a plain reading it become apparent that the two activities are distinct and separate activities. The first activity, viz., carrying on the business of banking connotes a larger activity than the activity of providing credit facilities to its members. The latter is restricted qua the members of the society while the former is wide enough to take within its sweep as its potential customers, both members and non-members. The interpretation that the latter phrase has a restrictive effect on the former expression "business of banking" ignores the word "or" which occurs between the two phrases. There is no warrant for reading the word "or" as "and". Once the Legislature has used the term "or" the logical consequence that flows from the contextual setting is that it provides for an alternative, a different distinct activity.

While examining a case wherein a co-operative society claims deduction under section 80P(2)(a)(i) one has to bear in mind the object with which the provision is introduced, viz., to encourage and promote growth of the co-operative sector in the economic life of the country in pursuance of the declared policy of the Government. The Supreme Court has also stated that if a question arises as to whether any particular category of income of a co-operative society

is exempt from tax what has to be seen is whether the income falls within any of the several heads because each would be a separate and distinct head and merely because conditions for deduction under one head are not satisfied that does not necessarily mean that an assessee is not entitled to deduction under another head wherein the conditions stand fulfilled. Hence the contention on behalf of the Revenue that the first activity, namely, business of banking, has to take colour from the second activity, namely, providing credit facilities to members does not merit acceptance. Section 80P requires that the profits and gains of business must be attributable to any one or more of the specific activities.

On a plain reading of the Gujarat Co-operative Societies Act, 1961, the scheme which unfolds is that in the case of a society carrying on business of banking, it would be permissible to make investments or deposits in any of the specified investments as provided in section 71 of the Gujarat Co-operative Societies Act including in any of the modes specified in section 20 of the Indian Trust Act, 1882, without there being any upper limit as to the amount that can be invested, once the statutory requirement of reserve fund as stipulated in Section 67(2) of the Gujarat Co-operative Societies Act is

satisfied. The provisions of the Banking Regulation Act, 1949, indicate that an entity carrying on the business of banking is not absolutely or wholly free; it is amenable to supervision/regulation. In other words, its investments are subject to scrutiny; and any impermissible investment, if any made, will not be permitted to continue by the regulator, i.e. the Reserve Bank of India. Bearing in mind that section 80P(2)(a)(i) requires a co-operative society and not a co-operative bank defined under the Gujarat Co-operative Societies Act, to be engaged in carrying on business of banking it is not possible to restrict the scope of the business to the definition of "banking" under section 5(b) of the Banking Regulation Act. Even otherwise a banking company including a co-operative society, may accept deposits for the purpose of lending or investment. The definition does not stipulate that investment has to be only to the extent provided either by the Gujarat Co-operative Societies Act or the Banking Regulation act. Hence, when investments are made in securities, which are a permissible mode of investment, either under the Banking Regulation Act or the Gujarat Co-operative Societies Act read with the Indian Trusts Act income arising therefrom would be attributable to the business of banking and the assessee would be eligible for deduction in terms of section 80P(2)(a)(i)."

8. During the course of hearing of this petition, the learned counsel for the petitioner has produced a xerox copy of the order dated 24th February 2006 passed by the Supreme Court in Petition(s) for Special Leave to Appeal (Civil) No(s). 3259 of 2006, which has been taken on record of the petition. A perusal of the same reveals that the decision rendered by the High Court of Gujarat in **Commissioner of Income-Tax vs. Baroda Peoples Cooperative Bank Limited (supra)** was challenged by the Income Tax Officer, Surat, before the Supreme Court and that the Special Leave Petition was dismissed by the Supreme Court vide order dated 24th February 2006. The decision of the Supreme Court in **M.P.Cooperative Bank Limited (supra)** on the basis of which the impugned notice under Section 148 of the Act is issued, is no longer a good law since it has been specifically overruled. A plethora of judgments of the Supreme Court and various High Courts have firmly laid down the rule that a provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the of the Legislature and not to defeat

it. The income arising out of interest from government securities is entitled to exemption in view of decision in **C.I.T. vs. Banglore District., 233 I.T.R. 282 (SC)**. Again in **C.I.T. vs. Ramnathpuram District, 255 I.T.R. 423 (SC)**, it is held that the income arising by way of dividend from shares of other co-operative institutions is entitled to exemption. Similarly, in view of the decision in **Mehsana Dist. vs. I.T.O., 251 I.T.R. 522 (SC)** that income arising out of locker rent is entitled to exemption. There is nothing in the phraseology of Section 80P(2)(a)(i), which makes it applicable only to income derived from working or circulating capital. In view of judicial pronouncements on the point, there is no manner of doubt that the income from the deployment of surplus funds would be exempt under Section 80P(2)(a)(i) of the Act. Therefore, notice which is impugned in the present petition cannot be upheld and will have to be struck down and set aside.

9. For the foregoing reasons, the Writ Petition succeeds. The notice dated 8th March 1999 issued by the Income Tax Officer, Ward 2(7), Ahmedabad, under Section 148 of the Act proposing to reassess the

income chargeable to tax is hereby set aside. Rule is made absolute. There shall be no orders as to costs.

[J.M.PANCHAL, J.]

[SMT. ABHILASHA KUMARI, J.]

Rajendra